IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Darshan Singh @ Darshan Lal Vs. The State of Raj.
(D.B.CRIMINAL APPEAL NO.96/2003)

D.B. Criminal Appeal under Section 374 Cr.P.C.against the judgment dt.15.1.2003 passed by the Additional Sessions Judge (Fast Track),Hanumangarh in Sessions Case No.133/2001.

****

Date of Judgment: May 29,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE MANAK MOHTA

Mr.H.S.S.Kharlia, for the appellant
Mr.Vishnu Kachhawaha, Public Prosecutor

REPORTABLE/-

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. This appeal is directed against the judgment dated 15.1.2003 passed by the learned Additional Sessions Judge(Fast Track), Hanumangarh convicting the appellant of offence under Section 302 I.P.C. and

sentenced to imprisonment for life and to pay a fine of Rs.500/-; in default to further undergo one month's simple imprisonment.

2. The factual scenario as emerged during the investigation is that the appellant Darshan Singh is the brother of D.W.3 Chhindri Bhatni with whom the deceased Kaku Singh was having illicit relations. It is alleged that in the intervening night of 3rd & 4th May, 2001 at about 12:15, P.W.1 Jaswant Singh received a telephonic call from P.W.4 Dr.Amarjeet Chawla to the effect that his daughter was perturbed and as such he should immediately reach to the house of his son-in-law deceased Kaku Singh. He gave this information to brother of the deceased P.W.15 Buta Singh. On reaching to the spot, he found the gate of the house closed but the window was open. He peeped inside through window and found two cots lying. On the space between the two cots fresh blood was covered by sand. He along with others entered in the house and found the dead body of Kaku Singh in pool of blood covered by quilt. There were severe injuries on his body. On being asked P.W.16 Geeta communicated by sign that on the other cot another person having mustache was sleeping. He

identified the said person as the brother of Chhindri. She also communicated that her deceased husband Kaku Singh was sleeping on the cot on the southern side. She was also sleeping on another cot on southern side. The man with mustache desolved a pill in the glass of water and made Kaku Singh to drink the same. During the night two more persons joined him. All the three persons killed Kaku Singh by sharp edged weapon. An information of the incident was lodged by P.W.15 Buta Singh by submitting a written report at Police Station, Hanumangarh. The police registered a case for offence under Section 302,201 I.P.C. and proceeded with investigation. The police prepared the inquest report and the site plan. The dead body was sent for autopsy. P.W.17 Dr.Rajendra Gupta conducted the autopsy on the dead body of deceased Kaku Singh vide Ex.P37. He noticed the following injuries:-

> (1) Incised wound 4 1/2" x 1" X bone fracture on the right lateral side of face, mandible region.
>
> (2) Incised wound 5 ½" X 2" bone deep all structure of neck cut wound.

In his opinion the cause of death was injury to vessels of neck. Trachea due to injury No.2. Injury No.2 was sufficient to cause death in ordinary course of

nature.

3. The appellant was arrested vide Ex.P14. In pursuance of the information given by him the police recovered a blood stained Kulhari and his clothes alleged to have been wearing at the time of incident. After usual investigation police laid charge-sheet against the appellant for offence under Section 302, 201 I.P.C.

4. The appellant pleaded not guilty and claimed trial. The prosecution in support of the case adduced oral and documentary evidence. The appellant in his statement under Section 313 of the Code of Criminal Procedure denied the correctness of the prosecution evidence appearing against him. He also produced three witnesses in support of the defence. The trial court having found the prosecution case proved convicted and sentenced the appellant in the manner stated above.

5. It is contended by Mr.H.S.S. Kharila learned counsel for the appellant that the trial court has committed error in placing reliance on the testimony of deaf and dumb witness P.W.16 Smt.Geeta. He has also

criticized the procedure adopted for recording the statement of P.W.16 Geeta. It is also submitted that the trial court has failed to record the signs made by the witness in answers to questions put to her and recorded only the interpretation of such signs. Thus, there is total non-compliance of Section 119 of the Evidence Act. He has referred to the Division Bench judgment of the Keral High Court in Kadungoth Alavi vs. State of Kerla reported in 1982 Cri.L.J. 94. Before we proceed to deal with the contentions of the learned counsel, it would be appropriate to briefly survey the prosecution evidence.

6. P.W.1 Jaswant Singh is the father-in-law of deceased Kaku Singh. He stated that on 3.5.2001 in the night at about 12 he received a telephonic call from P.W.4 Dr.Amarjeet Chawla informing him that his daughter had arrived at his clinic in perturbed condition of mind and as such he should immediately reach to take care of her. After informing P.W.15 Buta Singh the elder brother of the victim Kaku Singh he rushed to the clinic. He along with Geeta proceeded to the house of Kaku Singh. On the way Buta Singh and his son Gurmail Singh also joined them. They peeped into the house

from the open window and found that two cots were lying and in between them there was blood on the earth covered by sand. Thereafter, they entered in the house and found, the dead body of Kaku Singh was lying on a cot inside the Kotha. It was covered by quilt. There were severe injuries on his neck and other parts of the body. His daughter Geeta pointed out that her husband Kaku Singh was sleeping on the ground in open space in between the two cots. She communicated by sign that Darshan Singh the brother of the lady, who usually wears Murki in the nose was sleeping on the nearby cot. She was sleeping on other cot on the southern side of Kaku Singh. Her reference to lady wearing ring in the nose was with respect to Chhindri Bhatni. She also communicated by sign that Darshan Singh gave a Kulhari blow on the neck of Kaku Singh while he was sleeping. Thereafter, he went to the Police Station, Hanumangarh Junction and lodged the report. He also stated that Chhindri Bhatni was having illicit relations with the deceased Kaku Singh. Eight to ten months prior to the date of the incident, burn injuries were caused to his daughter Geeta by deceased Kaku Singh at the instance of Chhindri Bhatni. A case in that regard was registered by the police. The villagers advised Kaku

Singh to severe his relations with Chhindri Bhatni. This caused annoyance to Chhindri Bhatni against Kaku Singh. Thus, she arranged murder of Kaku Singh by her brother appellant Darshan Singh. In the cross examination, he admitted that he had not seen the trail of blood between the room and the open place. He also admitted that his daughter Geeta could read and write telephone numbers. He also stated that Geeta communicated to him by sign that while she was sleeping on the cot Darshan Singh inflicted a blow on deceased Kaku Singh. Before she could get up he gave a second blow. When she tried to raise voice he put his hand on her mouth and silenced her. The appellant Darshan Singh threatened her to help in taking the cot and the dead body inside the room otherwise she will also be finished. Thus, she helped Darshan Singh in taking the cot of Kaku Singh inside the room. When she was being confronted of omission in that regard in her statement Ex.D1 recorded by the police she pleaded ignorance.

7. P.W.4 Dr.Amarjeet Chawla stated that on 3rd May, 2001 he was at his residence. At that time a lady in perturbed condition arrived at his house. She was

weeping and shouting. She was trying to communicate something by sign. She was trying to communicate referring to mustache. He tried to pacify her and offered water to her. She asked him to supply a pen and paper. On the paper she gave out telephone number bearing 55172. He gave a ring on the said telephone number, which was responded to by P.W.1 Jaswant Singh. It was disclosed that the lady was the daughter of Jaswant Singh. After some time Jaswant Singh arrived on the scooter and left the place and took the said lady with him. In the cross examination, he admitted that the manner in which she wrote the telephone number on the paper, in his opinion she was an educated lady.

8. P.W.15 Buta Singh the elder brother of deceased Kaku Singh stated that on receiving a telephonic message he rushed to the spot. He met Jaswant Singh and Geeta Devi on the way. He reached at the house of Kaku Singh along with Jaswant Singh and Geeta Devi. When they entered in the house found that there were three cots. In open place in between the two cots blood was spread covered by sand. Geeta Devi by sign communicated that inside the room the dead body was

lying. There was lock on the room. The key was lying outside the room. The lock was opened and Jaswant Singh entered inside. On removing quilt it was found that Kaku Singh was dead. Geeta Devi communicated by signals that the brother of Chhindri Bhatni namely Darshan Singh along with her husband Kaku Singh arrived at the house at 6:15 in drunken condition. At that time she was preparing food. Darshan Singh desolved a pill in the glass of water and made Kaku Singh to drink it. Thereafter, both of them took the food and went to sleep. She was lying on a cot. When she was sleeping she could see that appellant Darshan Singh got up and took out a Kulhari. He gave a Kulhari blow on the neck of deceased Kaku Singh. Out of fear she did not raise cry and continued to sleep quietly. However, when he gave a second blow she got up. She was being threatened by appellant Darshan Singh. Thereafter, on giving a threat, she helped him in shifting the cot inside the room. Thereafter, out of fear she ran away and reported the incident at the Chawla Hospital. He also stated that Kaku Singh was having illicit relations with Chhindri Bhatni. In the cross examination he admitted that his deceased brother Kaku Singh made an attempt to kill his wife by burning.

He reached at the house of Kaku Singh before the arrival of Jaswant Singh and his daughter.

9. P.W.3 Jaswinder Kaur and P.W.5 Ramesh Kumar are the witnesses of last seen. P.W.6 Satnam Singh deposed that on the date of incident in the night at about 11-11.30 when he was returning from his field, he saw appellant Darshan Singh coming out of the house of deceased Kaku Singh carrying Kulhari in his hand. P.W.7 Hari Singh, P.W.9 Subhash Chandra and P.W.10 Rameshwar Lal are the formal witnesses of different police memos. P.W.8 Manoj Kumar, P.W.11 Maghar Singh, P.W.12 Asu Singh, P.W.21 Narendra Kumar and P.W.22 Bhagla Ram are the formal police witnesses. P.W.13 Ashok Kumar, P.W.14 Devilal and P.W.18 Chet Ram are the formal police witnesses of link evidence. P.W.19 Surendra Kumar and P.W.20 Paramjit Singh are the photographers. P.W.23 Ramji Lal is the Investigating Officer. He has given details of the investigation. The trial court recorded the conviction of the appellant on the testimony of the eye-witness P.W.16 Geeta, the incriminating circumstance of last seen and the recovery of the blood stained clothes of the accused and blood stained Kulhari.

10. As far as evidence of occurrence is concerned, P.W.16 Geeta Devi is the sole witness. She is admittedly deaf and dumb. Before recording her statement the trial court recorded as follows:-

> "The witness is deaf and dumb. Therefore, she is not being administered oath. Her statement is being recorded by signs. Her father Jaswant Singh is with her."

The witness communicated by sign that her husband was murdered about 8 ½ months' back. She communicated by pointing finger that her husband arrived at the house about about 6:30. She pointed out from the watch available in the court showing 6:30. Showing the photograph of her deceased husband she pointed out that he is dead. Pointing towards the mouth she indicated that her husband consumed liquor with accused Darshan Singh. Pointing towards a glass of water and the photograph of her deceased husband she indicated that appellant Darshan Singh desolved a pill in the water and made the same drink to the deceased. She also showed that at that time she was preparing food in the kitchen. By sign she pointed out that she served dinner to her husband and appellant Darshan Singh. Thereafter, both of them went to sleep on the

cot. She also went to sleep. She pointed out by sign that at about 11:30 appellant Darshan Singh got up and brought a Kulhari and gave a blow on the neck of Kaku Singh. He caught hold of her hairs and threatened to keep quite. By signs she pointed out that the appellant asked her to help in taking the cot and the deceased inside the room. With her help the dead body of deceased Kaku Singh and the cot was brought inside the room. The appellant Darshan Singh locked the room and hanged the key. She pointed out by showing sign that she went to the clinic of a doctor. The witness wrote Telephone Number of her father being 55172 on a paper. Her father arrived on the Scooter. He took her to the house. By sign she pointed out that the accused having mustache killed her husband. She had disclosed this fact to her father. The witness by sign also indicated that the Kulhari was thrown in the well by the appellant. The witness by showing the photograph Ex.P9 pointed out that the lady in the said photograph is the sister of the accused appellant and she was having illicit relations with her husband. She by sign showed marks of burn on her body. In the cross examination by sign she pointed out that Chhindri Bhatni was having illicit relation with her husband for the last more than 8

years. However, her husband's relations with Bhatni were severed. She also admitted that Chhindri Bhatni used to live with her in the same house for the last more than 8 years. She also showed by sign that she had sustained burn injuries on her body 7 years back. The witness by sign also pointed out that Chhindri Bhatni was having ten brothers. She was not known to any of her brothers. None of brothers of Chhindri Bhatni had ever visisted their house. She also admitted that Darshan Singh was not shown to her at the Police Station.

11. It is contended by the learned counsel that the statement of P.W.16 Smt.Geeta Devi at the first instance is not admissible in evidence as the trial court has not followed the procedure provided for examination of a deaf and dumb witness. Secondly, it is submitted that even if the statement of Geeta Devi is found to be admissible in evidence, it does not inspire confidence. As far as question of admissibility of the statement of P.W.16 Geeta Devi is concerned, it is submitted in the first instance that she has not administered oath and secondly her statement could not be recorded in absence of an expert. Thirdly, the

statement of Smt.Geeta Devi has been recorded with the help of her father P.W.1 Jaswant Singh, who had taken active part during the investigation of the case and who was a witness in the same trial. The learned counsel has referred to a decision of Calcutta High Court in Ah Soi v. Kind Emperor reported in A.I.R. 1926 Cal 922, wherein it is held that a witness who took active part during the investigation of the case and who gave evidence before the committing Magistrate and who was willing to give evidence on the side of the prosecution in the Sessions trial should not be chosen as interpreter. The Calcutta High Court emphasized that this is opposed to the elementary ideas of justice.

12. In the instant case P.W.16 Geeta Devi herself made an application stating that an expert be arranged for facilitating in recording of her statement by signs. It was also stated that she being deaf and dumb could only give statement ex parte or in other words she could not answer the questions in cross examination. However, the court proceeded to record her statement without the assistance of an expert and in presence of her father P.W.1 Jaswant Singh. Thus, the question arises for consideration as to what exactly the

procedure was to be followed by a court in examination of a deaf and dumb witness. **In this regard it would be convenient to read Section 119 of the Evidence Act**, which is extracted as follows:-

> "Sec.119 A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."

This aspect was considered by the Gujarat High Court in Kumbhar Musa Alib vs. State of Gujarat reported in A.I.R. 1966 Guj. 101, wherein it is held,

> "If evidence is recorded under that section, there must be a record of signs."

The Court further held that if the trial court fails to record the signs made by the witness in answers to questions put to him and records only the interpretation of such signs, there is no correct compliance of Section 119 of the Evidence Act.

13. A Division Bench of the Kerala High Court in Kadungoth Alavi vs. State of Kerala reported in 1982 Cri.L.J.94 while impressing upon the need to examine a deaf and dumb witness with the help of an expert or

some other person, who is very much familiar with the witness has observed,

> "As the learned Sessions Judge cannot be expected to have anything more than a layman's Knowledge in conversing with a deaf and dumb person it was highly improper on his part to embark upon the examination of P.W.4 without the help of an expert or a person familiar with his mode of conveying ideas to others in day-to-day life."

The Kerala High Court dealing with the question of statement of deaf and dumb witness to be recorded by some body else referring to the Calcutta High Court's case in Ah Soi(supra) observed as follows:-

> "If somebody else is available, it is better the services of a person who is a witness in the case is not made use of to interpret his evidence or to converse with him. In Ah Soi v. King Emperor (AIR 1926 Cal 922), it has been held that a witness who took active part during the investigation of the case and who gave evidence before the committing Magistrate and who was willing to give evidence on the side of the prosecution in the Sessions trial should not be chosen as interpreter. The Calcutta High Court said that this is opposed to the elementary ideas of justice."

Thus, before recording the statement of deaf and dumb witness, the court is required to ascertain that he possess the requisite amount of intelligence, and that he understands the nature of oath. Not only this, but he is also required to

record the satisfaction to that effect. The court is required to ascertain, if the witness either by writing or sign can make intelligible of what he has to speak. If he is able to communicate his statement perfectly by writing, it will be more satisfactory method of taking evidence. When such a witness is not able to write, then he can make sign showing what he wants to say. If, it is by signs, those signs must be recorded and not only the interpretations of those signs. It is necessary to enable the appellate court to know whether the interpretation of the sign is correct or not. It is not safe for a court to embark upon the examination of a deaf and dumb witness on his own without the help of an expert or a person familiar with his mode of conveying ideas to others in day-to-day life. However, such a person should not be an interested person, who had participated in the investigation and who is also a witness in the same trial.

14. In the instant case, the learned trial court did not make any effort to ascertain prelims like her intelligence, the understanding of oath, capacity to

communicate by writing. Irrespective of the fact that application was made by the witness herself to arrange for an expert, no efforts were made in this direction. Instead he on his own by deciphering the gesture of the witness proceeded to record the statement. There is nothing to show to what extent her father P.W.1 Jaswant Singh extended assistance in recording of her statement. It appears that her statement has been recorded with his assistance, on this count alone her statement cannot be admitted in evidence. It is not in dispute that P.W.1 Jaswant Singh participated during the investigation and also appeared as a witness in the same trial. It appears from her statement that she had written telephone number of her father on a paper in English. If, it is so, she could have been asked to give her statement in writing, otherwise with the help of expert. We are of the view that the learned Judge having not taken the requisite precautions in recording the statement of a deaf and dumb witness, rendered the statement inadmissible. Thus, the conviction of the appellant cannot be sustained on the testimony of P.W.16 Mst.Geeta.

15. Even otherwise the statement of P.W.16 Mst.Geeta

Devi does not inspire confidence. She has admitted in the cross examination that Chhindri Bhatni was having ten brothers. None of her brothers had ever visisted her house. She also admitted that she had not seen appellant Darshan Singh prior to the incident. She did not disclose the features of appellant Darshan Singh to the police. She also admitted that the marks of burn on her body were 7 years old. She also admitted that her husband had severed his relation with Chhindri Bhatni. As per her saying if the appellant Darshan Singh was not a person known to her prior to the date of incident, it was necessary for the police to have arranged identification parade more particularly when she has stated that there were ten brothers of Chhindri Bhatni. She has stated that the appellant Darshan Singh and deceased consumed liquor, but this does not find corroboration from medical evidence. P.W.17 Dr.Rajendra Gupta has admitted that there was nothing to show that deceased consumed liquor. She also stated that the appellant had diluted a pill in a glass of water and the same was made to drink to the deceased. There is nothing to show that what sort of pill was diluted. The viscera was sent to the Forensic Science Laboratory. The report does not show that any sort of

poison was administered to the deceased. It does not sound to the common sense that a couple would allow a stranger to sleep along with them in the same room. Even if Darshan Singh was known to them admittedly the relations of P.W.16 Geeta Devi with Chhindri Bhatni were not cordial and she would have never allowed her brother to spend night with them. There was absolutely no reason that Darshan Singh to kill Kaku Singh. On his death Chhindri Bhatni was not to get any benefit. If she was to be benefited, it could only by death of P.W.16 Geeta Devi or if anybody else could be benefited of the death of Kaku Singh, it could be P.W.16 Geeta Devi and P.W.1 Jaswant Singh. There is evidence to the effect that there was some problem as to the irrigated land of Kaku Singh. There was apprehension in the mind of Geeta and her father that the deceased may give the said land to Chhindri Bhatni. The name of Darshan Singh does not find place in the First Information Report. P.W.1 Jaswant Singh has stated that he had disclosed the name of Darshan Singh to the police but he was not aware as to why the same was not recorded. The account of the incident given by this witness is not only highly doubtful but beyond comprehension to believe. Thus, on consideration the entire evidence, we

do not find the statement of P.W.16 Geeta Devi trustworthy. The learned trial court has committed an error in relying on the statement of P.W.16 Geeta Devi.

16. As far as the other incriminating circumstances are concerned, there is evidence of last seen. P.W.5 Ramesh Kumar has stated that he had taken deceased Kaku Singh to his house in his Tempo. He was accompanied by the appellant Darshan Singh. He also stated that he left them at the house at about 6 P.M. The another witness of last seen is P.W.3 Jaswinder Kaur. She is the sister of deceased Kaku Singh. She stated that on 3.5.2001 her daughters Gurmit Kaur and Nikki visited the house of Kaku Singh. It was reported by them that Darshan Singh was seen lying on the cot. On seeing them he covered his face by pillow. It is clearly a hear-say evidence. The prosecution has not produced Gurmit Kaur and Nikki. In our view evidence of last seen is shaky and doubtful. The another evidence is of recovery of Kulhari vide Ex.P12 in pursuance of the information given vide Ex.P62. As per FSL report Ex.P64 no human blood was found on the Kulhari. Thus, the evidence of recovery of Kulhari cannot be used an incriminating circumstance against

the appellant. The another incriminating circumstance is of recovery of a blood stained Pent in pursuance of the information given vide Ex.P22. The blood on his clothes was found to be stained with human blood. It is stated that the appellant has not given any explanation of presence of the human blood. The sole circumstance is not sufficient to connect the appellant with the alleged crime. In view of the doubtful and suspect nature of evidence sought to be relied upon by the prosecution to substantiate the charge, the instant case suffers from the serious infirmities and lack of legal creditability to merit acceptance. Thus, taking into view totality of the entire evidence, in our opinion prosecution has failed to bring home the guilt of appellant beyond doubt. Thus, the trial court has committed error in holding the appellant guilty for the murder of deceased Kaku Singh.

17. Consequently, the appeal is allowed. The judgment of the Additional Sessions Judge(Fast Track), Hanumangarh dated 15.1.2003 convicting the appellant for offence under Section 302 I.P.C. and sentencing to imprisonment for life is set aside. The appellant is acquitted of offence under Section 302 I.P.C. He is in

Jail. He shall be set at liberty forthwith, if not required in any other case.

(MANAK MOHTA), J. **(N.N.MATHUR), J.**

BKS/-